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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 992

DANIEL L. GINSBERG, individually and on behalf of five-sixths of the stockholders of Nash Miami Motors, Inc.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	4
Constitutional and Statutory Provisions Involved	6
Statement of the Case	2
Argument and Reasons for Granting the Writ	6
Conclusion	17
Certificate of Service	18
Appendix A (Constitutional and Statutory Provisions Involved)	App. 1
Appendix B (Opinion and Judgment of Supreme Court of Florida below)	App. 13
Appendix C (Order Denying Rehearing of Supreme Court of Florida below)	App. 14
Appendix D (Order of Final Disposition and Order on Rehearing of Circuit Court)	App. 15

TABLE OF AUTHORITIES

Cases:	Page
A. L. Lawrence, 27 T.C. 713 (1957)	12
Abel vs. Campbell, 334 F.2d 339 (5th Cir. 1964)	8
Bolling vs. Sharpe, 347 U.S. 497 (1954)	14
Cohen vs. Gross, 316 F.2d 521 (1963)	9
Ex Parte Bakelite, 279 U.S. 438 (1929)	13
Flora vs. United States, 362 U.S. 145 (1960)	11
Glidden Company vs. Zdanok, 370 U.S. 530 (1962)	13
Hurd vs. Hodge, 334 U.S. 24 (1948)	14
Klassie vs. United States, 289 F.2d 96 (8th Cir. 1961)	10
Ohlinger vs. United States, 219 F.2d 310 (9th Cir. 1955)	10
Ohlinger vs. United States, 135 F.Supp. 40 (S.D. Idaho 1955)	13
Reo Motors vs. C.I.R., 219 F.2d 610 (6th Cir. 1955)	14
Shahadi vs. C.I.R., 266 F.2d 495 (3rd Cir. 1959)	10
Shelley vs. Kramer, 334 U.S. 1 (1948)	14
Stern vs. C.I.R., 215 F.2d 702 (3rd Cir. 1954)	14

TABLE OF AUTHORITIES (cont.)

	Page
Tutun vs. United States, 270 U.S. 568 (1926)	15
Williams vs. United States, 289 U.S. 553 (1933)	13
Willmut Gas & Oil Co. vs. Fly, 322 F.2d 301 (5th Cir. 1963) *cert. den.*, 375 U.S. 984	16
Other Authorities:	
Annual Report of the Commissioner of Internal Revenue, 1961	14
Annual Report of the Commissioner of Internal Revenue, 1962	14
Annual Report of the Commissioner of Internal Internal Revenue, 1963	14
Annual Report of the Commissioner of Internal Revenue, 1964	15
Annual Report of the Commissioner of Internal Revenue, 1965	15
Congressional Record, June 16, 1948	16
United States Constitution:	
Article I, Section 8, Clauses 1 and 18	6
Article III, Section 1, and Section 2 Clauses 1 and 4	6
Fifth Amendment	6

TABLE OF AUTHORITIES (cont.)

	Page
26 U.S.C. §732	16
26 U.S.C. §6213(a)	6
26 U.S.C. §6501	10
26 U.S.C. §6871	2
26 U.S.C. §7441	6
26 U.S.C. §7443(f)	14
26 U.S.C. §7454	10
28 U.S.C. §1257(3)	2
28 U.S.C. §1346(a)(1)	6
Fla. Stat. 608.28	2

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CITATIONS TO OPINIONS BELOW

The Order of Final Disposition of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, is not reported, appears in the Record at pp. 93-95, and is printed in Appendix D hereto, *infra*, at pp. 15. The Supreme Court of Florida entered no opinion; its judgment is not yet officially reported. It will be reported at a subsequent time in the Southern 2d Reports, and is printed in Appendix B hereto at p. 13.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on September 28, 1966, and is printed in Appendix B hereto, *infra*, p. 13. Rehearing was denied on October 26, 1966; Appendix C hereto, *infra*, p. 14. The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner, acting as a stockholder, creditor, and director of Nash Miami Motors, Inc., filed his complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County seeking the dissolution and liquidation of the corporation pursuant to Florida Statutes, Section 608.28. (R. 1-2). An Order for Dissolution was thereupon entered by the Court, dissolving the corporation and appointing a trustee to collect all assets, to pay all debts and liens upon corporate funds and property, and then upon order of Court to distribute any remaining balance to the stockholders.

The respondent United States, relying upon 26 U.S.C. §6871, immediately assessed alleged income tax deficiencies and on January 20, 1964, filed tax lien claims against the corporation amounting in the aggregate to $65,038.39 including penalties and interest, (R. 5) despite the pendency of a proceeding to redetermine the alleged deficiencies in the Tax Court of the United States.[1] This amount far ex-

[1]The corporation had received a statutory "90-day letter" on March 27, 1957 informing it of claimed income tax deficiencies for the years 1947 and 1948. In addition to the deficiency, the Government alleged fraud (as was necessary to avoid the statute of limitations) and claimed 50% penalties.

Unable to pay these claimed deficiencies and penalties prior to

ceeded the total corporate assets (R. 93), which, if the tax lien were to be held invalid, would be sufficient to pay all creditors, and leave a balance to be distributed to the stockholders. Petitioner filed a motion to strike the claim of the United States, initially raising the substantial federal constitutional and statutory grounds upon which review is sought in this Court. (R. 6). The Circuit Court deferred ruling on petitioner's Motion (R. 7), and an Answer to the Government's tax claim reiterating petitioner's challenges was filed. (R. 10-15).

In the meantime the Tax Court proceedings continued unabated and that body rendered a decision in favor of the Government upon all issues, including fraud, on November 25, 1964.[2] Subsequently a hearing (R. 38-91), was held by the Circuit Court wherein the Government merely submitted its claim (R. 62) and the decision of the Tax Court (R. 58). Over petitioner's objections, such decision was accepted by the state court as final and binding upon the corporation and without any further evidence the Circuit Court entered its Order of Final Disposition (R. 93) directing the trustee to pay all remaining assets of the corporation to the Treasury Department. Petitioner moved for rehearing, reiterating his arguments, and the Court entered an Order (R. 94-95) denying the petition, reciting that it had passed upon the constitutional and federal statutory grounds which had been raised.

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contesting them, the corporation on June 17, 1957 pursuant to 26 U.S.C. §6213 filed a petition for redetermination in the Tax Court, which case was then pending.

[2]The Memorandum Findings of Fact and Opinion of the Tax Court is reported at ¶64,230 Prentice-Hall Tax Court Memorandum Decisions, 1964. The decision was subsequently affirmed by the Court of Appeals, Fifth Circuit, *Nash-Miami Motors, Inc. vs. C.I.R.*, 358 F.2d 636, *cert. denied*, —U. S.—, 87 S.Ct. 227 (1966).

On appeal to the Supreme Court of Florida, petitioner preserved all federal constitutional and statutory grounds in his Assignments of Error (R. 96-99) and briefs on the merits. The Florida Supreme Court affirmed the Order of the Circuit Court without opinion (R. 102).

QUESTIONS PRESENTED

I

Where United States Treasury officials have elected to file a deficiency assessment and tax lien claim in a state court receivership proceeding under the provisions of 26 U.S.C. §6871(b) despite the pendency of a Tax Court proceeding, is the Tax Court deprived of jurisdiction to determine the merits of such claim, rendering void any subsequent determination by the Tax Court upon such claim?

II

Where United States Treasury officials file deficiency assessment and tax lien claims in a state court receivership proceeding pursuant to 26 U.S.C. §6871(b), is petitioner, as a party to such proceeding denied due process of law under the Fifth and Fourteenth Amendments, United States Constitution, where the respondent continues the Tax Court proceeding, and a subsequent decision of the Tax Court, rendered without jurisdiction, is presented by respondent as its entire case and is accepted by the state court as res adjudicata upon the merits of the tax lien claim including the necessary finding of fraud?

III

Where a claim for tax deficiency is barred by the statute of limitations, except for an allegation of fraud, is petitioner as a stockholder in and creditor of the taxpayer corporation denied due process of law and equal protection under the law, contrary to the Fifth Amendment of the United States Constitution where the taxpayer is compelled solely by the lack of wealth to challenge the allegations of fraud and the validity of deficiency assessments and fraud penalties, brought by respondent, in the Tax Court of the United States, an Article I Court, rather than in a court conforming to the requirements of Article III of the Constitution of the United States.

IV

Where Congress by statute allows wealthy taxpayers, who can prepay asserted tax assessments and penalties made against them by the Commissioner of Internal Revenue, access to an Article III court for the purpose of challenging and determining the validity of such asserted tax liability, may Congress under the Fifth Amendment to the United States Constitution validly discriminate against poor taxpayers, who cannot prepay such asserted assessments and penalties, by denying them access to an Article III court for such purpose.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Constitution, being lengthy, are set forth in Appendix A hereto, *infra*, p. 1:

1. Article I, Section 8, Clauses 1 and 18, U. S. Constitution

2. Article III, Section 1, and Section 2, Clauses 1 and 4, U. S. Constitution

3. Fifth Amendment, U. S. Constitution

4. Fourteenth Amendment, U. S. Constitution

The following statutory provisions, being lengthy, are set forth in Appendix A hereto, *infra*, p. 1:

1. 26 U.S.C. [Internal Revenue Code] §§ 6213(a), 6214, 6215(a), 6871, 7421(a), 7422, 7441-7444

2. 28 U.S.C. [Judicial Code] § 1346(a)(1).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The present case raises important questions of federal statutory law, relating to the procedures to be followed by Treasury Department officials under 26 U.S.C. §6871. In this statute, Congress has made the following provisions with respect to assessment of deficiencies and

the forum in which the determination of such deficiencies may proceed against taxpayers in bankruptcy or receivership:

26 U.S.C. §6871:

"(a) Immediate assessment.—Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213(a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

"(b) Claim filed despite pendency of Tax Court proceedings.—In the case of a tax imposed by subtitle A or B claims for the deficiency and such interest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the rede-

> termination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver. As amended Sept. 2, 1958, Pub.L. 85-866, Title I, §88, 72 Stat. 1665.

Thus deficiency assessments against a bankrupt or corporate taxpayer in receivership may, by statute, be presented by claim to a court for adjudication, *despite the pendency of Tax Court proceedings* if the Government elects to do so.

In *Abel vs. Campbell*, 334 F.2d 339 (5th Cir. 1964), the Court of Appeals, Fifth Circuit, considered the effect upon Tax Court jurisdiction where the Government exercises its prerogative under Section 6871(b) and files its claim in the receivership proceeding:

> "The legislative history makes clear the intent of Congress that Section 6871 was meant to 'take the case from the jurisdiction of the United States Board of Tax Appeals [Now the Tax Court of the United States] in cases of deficiency.' H. Rep. No. 704, 73rd Cong., 2d Sess., p. 34 (1939), 1939-1 Cum. Bull. 554, 580." 334 F.2d at 341.

The Court of Appeals for the Second Circuit has also had occasion to consider the effect of Section 6871(b) upon a Tax Court proceeding pursuant to Section 6213:

> " . . . We view the provisions of Section 6871, not as a mere brief suspension of the requirements of Section 6213, but rather as a completely superseding procedure for the determination and collection of tax claims that are asserted in bankruptcy." *Cohen vs: Gross*, 316 F.2d 521, 522.

It is clear therefore that when the Government elected to rely upon Section 6871(b) and to file its deficiency assessment and claim of lien in the state receivership proceeding, it effectively deprived the Tax Court of jurisdiction to finally determine the merits of the deficiency assessment. Upon filing of the claim on January 20, 1964, the sole jurisdiction to determine the merits of the assessment was vested in the state Circuit Court below.

Rather than presenting the merits of its claim to that Court, however, as required by the Statute, the Government continued the Tax Court litigation although that body then lacked jurisdiction. An opinion in the Government's favor upon all issues was rendered by the Tax Court on August 31, 1964.

At the subsequent trial in the Circuit Court, the Government merely introduced its claim and the opinion of the Tax Court as its entire case. The state court erroneously considered itself bound by the Tax Court opinion under res adjudicata principles and rendered judgment for the Government, based solely and completely upon the Tax Court opinion which clearly was void for lack of jurisdiction.

Since the entire case of the Government rested upon

proof of its allegations of fraud, 26 U.S.C. §7454,[3] petitioner contends that he has been deprived of his property without due process of law, contrary to the Fifth Amendment, United States Constitution, in that no Court possessed of jurisdiction has yet determined the merits of the Government's case, which fails completely if the fraud allegations are not proved.

This burden cannot be met by merely introducing the opinion of an administrative body which lacked jurisdiction to render any decision. In effect, the corporate taxpayer was found to be guilty of fraud in the state court below upon the basis of the Government's bald assertion that it was so. Such a trial, with no competent evidence introduced to support the Government's necessary burden of proof of fraud cannot stand, consistent with due process of law under the Fifth and Fourteenth Amendments.

Petitioner respectfully urges this Court to grant certiorari in order to review the procedures followed herein by the Government in the light of Section 6871, to clarify the law and prevent jurisdictional conflict between the

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[3] "26 U.S.C. 7454. Burden of proof in fraud and transferee cases.
(a) Fraud.—In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate."

Thus it is clear that the usual presumption of correctness of the commissioner's tax deficiency determinations is inapplicable and will not save the Government's total failure to present evidence relating to fraud or any other issue of liability in the State Court. See, *e.g. Ohlinger vs. United States*, 219 F.2d 310 (9th Cir. 1955); *Klassie vs. United States*, 289 F.2d 96 (8th Cir. 1961); *Shahadi vs. C.I.R.*, 266 F.2d 495 (3rd Cir. 1959), *cert. denied*, (1959), 361 U.S. 874.

But for the fraud allegation all tax claims involved herein against the corporation would have been barred long prior to the notice of deficiency. 26 U.S.C. §6501.

Tax Court and state and federal courts in bankruptcy and receivership proceedings, and to rectify the glaring violation of due process of law in the present case.

In addition to the above grounds petitioner contends that any decision rendered by the Tax Court of the United States and accepted as res adjudicata by the state court below was invalid for the reason that the corporate taxpayer was denied due process of law and equal protection under the law, contrary to the Fifth and Fourteenth Amendments, where it was compelled solely by lack of wealth to challenge the allegations of fraud and deficiency assessments in the Tax Court rather than in a court conforming to the requirements of Article III of the United States Constitution.

In *Flora vs. United States*, 362 U.S. 145 (1960), it was held that payment in full of all tax deficiency and penalty assessments was a necessary prerequisite under 28 U.S.C. §1346(a)(1) for challenging the validity of such assessments in the United States Court of Claims or in United States District Courts. This Court there rejected a statutory construction which would have permitted partial payments of alleged deficiencies and suits for recovery in these courts, stating with respect to the present scheme:

> "The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner." 362 U.S. at 163.

The Court recognized that:

> " . . . a decision in petitioner's favor could be expected to throw a great portion of the Tax Court litigation into the District Courts." 362 U.S. at 176.

Implicit in this statement is a recognition of petitioner's basic contention in the present case that Congress has provided substantially different standards of justice for complaining taxpayers based solely upon a criterion of ability to pay. This discrimination is even more invidious and burdensome when fraud is the foundation upon which the case is built.

By statute Congress has decreed that, for those taxpayers able to pay the price, a trial forum[4] is available which is established under Article III of the Constitution of the United States and presided over by judges whose independence is guaranteed by the particular provisions of Article III, and which applies (in the case of District Courts) at the trial level a body of law approved by the United States Court of Appeals for its particular Circuit.

Similarly by statute, however, Congress has provided for those taxpayers unable to pay in advance, a trial forum established under Article I of the Constitution (i.e., the Tax Court), presided over by "Judges" whose independence is unprotected by constitutional guarantee, and which applies a body of law which may differ substantially from that approved by the United States Court of Appeals for the taxpayer's circuit; see, e.g., *A. L. Lawrence*, 27 T.C. 713 (1957).

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[4]I.e., U.S. District Courts and the Court of Claims; see *Glidden Company vs. Zdanok*, 370 U.S. 530 (1962).

In cases of fraud where credibility and demeanor of the witnesses are all important factors in the factual determination, the invidiousness of the discrimination against less wealthy taxpayers is even more manifest, particularly in cases brought in federal District Courts where the taxpayer is accorded the right to trial by jury. Thus, in *Ohlinger vs. U. S.*, 135 F.Supp. 40 (D. Idaho 1955), the Court permitted a taxpayer (who was fortunately able to pre-pay the Government's claim and thus gain access to an Article III Court) to make a tardy request for a trial by jury, although guilty of excusable neglect. In so ruling the District Court expressly noted the special importance of a jury trial where fraud is alleged, and said:

> "Further, as fraud is alleged as a defense the action is peculiarly one to be decided by a jury, and under the existing circumstances of this case a jury trial should be provided." 135 F.Supp. at 42.

This distinction between an Article III forum and an Article I forum is not an idle or meaningless one, as demonstrated by the several opinions in *Glidden Company vs. Zdanok*, 370 U.S. 530 (1962). There it was held that the United States Court of Claims and the Court of Customs and Patent Appeals are courts established under Article III of the Constitution, overruling *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929), and *Williams vs. United States*, 289 U.S. 553 (1933). The dissenting opinion in *Glidden* argued with force, and the majority opinions carefully considered, the differences in outlook and independence between judges who sit pursuant to Article III and those who hold office under Article I. This difference is

of particular importance where the Government itself is a party with adverse interests in the litigation.

In the present context it is not in the least abstract or theoretical to question the independence and outlook of Tax Court judges who are appointed for a term of years to an "executive agency",[5] and who can be removed by the President,[6] yet are called upon to exercise solely judicial powers,[7] to find facts, and to determine traditional legal issues such as fraud involving large penalty levies.

Affording an Article III trial forum solely to those who can buy access to it, strikes deeply into fundamental concepts of fairness. If a hearing before an Article III trial court is provided for some, it cannot be denied to others solely because they cannot pay the price.

It is this difference in treatment, redounding to the substantial benefit of the Government in practical terms,[8] which petitioner contends violates due process of law and equal protection under the laws as guaranteed by the Fifth Amendment. Cf. *Bolling vs. Sharpe*, 347 U.S. 497 (1954); compare *Hurd vs. Hodge*, 334 U.S. 24 (1948), with *Shelley vs. Kraemer*, 334 U.S. 1 (1948).

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[5]26 U.S.C. 7441.

[6]26 U.S.C. 7443 (f).

[7]*Stern vs. C.I.R.* (3 Cir. 1954), 215 F.2d 702; *Reo Motors vs. C.I.R.* (6 Cir. 1955), 219 F.2d 610.

[8]The Annual Reports of the Commissioner of Internal Revenue for the years 1961-1965 show the percentage of tax cases won or partially won, on a comparative basis, as between Article III forum litigation (the U. S. District Courts and the Court of Claims) and Article I forum litigation (the Tax Court). The percentage won or partially won by the Government in the Tax Court is significantly higher. See Annual Report of C. I. R. for 1961, p. 59; Annual Report of C. I. R. for 1962, p. 70; Annual Report of C. I. R. for 1963, p. 37; Annual Report

Attention is directed toward the inequity and invidious discrimination inherent in a system where wealthy litigants, able to pay the amount in controversy can buy access to an Article III forum, judge and law, while those unable to come up with "cash in advance" are relegated to an Article I forum, judge and law.[9] This is to say that the Tax Court of the United States, if it is to accord equal justice to those taxpayers required to seek relief in that forum, *must be established as an Article III forum* on a

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of C. I. R. for 1964, p. 31; Annual Report of C. I. R. for 1965, p. 44. The following tables are based upon the information therein published:

TAX COURT

	'60	'61	'62	'63	'64	'65
Won by Government	676	313	275	293	272	235
Lost by Government	73	108	93	109	100	84
Partially won by Government	154	159	163	159	143	179
Percent won or partially won	92	81	82	81	81	83

DISTRICT COURT

	'60	'61	'62	'63	'64	'65
Won by Government	168	166	192	166	227	215
Lost by Government	170	192	213	200	180	145
Partially won by Government	43	39	44	56	45	45
Percent won or partially won	55	52	53	53	60	64

COURT OF CLAIMS

	'60	'61	'62	'63	'64	'65
Won by Government	43	17	27	34	14	40
Lost by Government	21	24	23	12	15	13
Partially won by Government	6	5	6	18	7	15
Percent won or partially won	70	48	59	81	58	81

[9]The system thus enacted by Congress gives an "option of either an administrative or a legal remedy" (*Tutun v. United States*, 270 U.S. 568 at 576-577 (1926)) only to those who can afford to choose the legal remedy by paying in full and in advance the asserted liability as claimed by the tax officials. Where, as here, the claim is made some ten years after the tax returns were filed, with heavy fraud penalties added to the alleged deficiencies, only a taxpayer with much accumulated capital could afford to invoke the judicial remedy. In short, the present system discriminates against a taxpayer without accumulated capital sufficient to pay in advance whatever tax deficiency plus penalties an appointed executive functionary may claim he owes.

parity with the District Courts and Court of Claims of the United States.

Congress might, as it has in the past, provide a solely judicial remedy for complaining taxpayers (viz., the situation prior to the creation of the Board of Tax Appeals in 1924), or it might provide a solely administrative remedy (viz., the present situation in regard to certain kinds of tax controversies, e.g., 26 U.S.C. §732),[10] or both. What petitioners contend that Congress may not constitutionally establish is the system as presently constituted, with the right to an Article III trial forum available only for those able to afford them, and an Article I trial forum for those unable to pay in advance.

This anomolous and discriminatory situation has not gone unrecognized by Congress,[11] and it is respectfully submitted that this Court is presented in this case with the constitutional issue and should provide the impetus for corrective action by Congress, by declaring the present statutory scheme unconstitutional as in violation of the Fifth Amendment.

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[10]See *Willmut Gas & Oil Co. v. Fly*, 322 F.2d 301 (5 Cir. 1963), *cert. den.*, 376 U.S. 984.

[11]Statement by Representative Hays, Congressional Record, June 16, 1948, p. 8679:

"The House, by an overwhelming vote, approved the transfer of the Tax Court from the executive to the judicial branch of the government. Our position is impregnable from the standpoint of logic and constitutional intent, yet because of certain incidents in the peculiar history of this splendid court, it is classified technically as an agency of the executive branch. No one can question the fact that it is a court legislatively established as prescribed by the Constitution. The amendment to which we are asked to agree defeats the action of the House in approving its transfer to the department where it logically belongs. Our concurrence with the Senate (in agreeing to the Senate Amendments) perpetuates one of the strangest anomalies in the government."

The Government may not be constitutionally required to provide an Article III forum to taxpayers disputing their taxes, but if it does, it should not be allowed to condition access to that forum on the basis of ability to pay unless it provides a similarly independent forum for those unable to pay cash in advance.

Petitioner, in addition, as a stockholder in the corporate taxpayer, has yet to be accorded due process of law which must include a hearing in a forum with jurisdiction to decide the issues, and where some evidence is presented to sustain the Government's burden of proof of its allegations of fraud against the corporate taxpayer.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the judgment of the Florida Supreme Court below vacated with directions to remand to the Circuit Court in order that evidence may be presented to that Court which possesses the sole jurisdiction to determine the merits of the Government's assessed deficiency.

Respectfully submitted,

Neal Rutledge

Allan Milledge

Richard L. Horn

Eleanor L. Shockett
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida was served this ____ day of January, 1966, upon the following persons by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage prepaid:

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DANIEL L. GINSBERG, individually and on behalf of five-sixths of the Stockholders of Nash Miami Motors, Inc.,

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Appendix To Petition for a Writ of Certiorari To the Supreme Court of Florida

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved:

1. U. S. Constitution, Article I, Section 8, Clauses 1 and 18:

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

"* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

2. U. S. Constitution, Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

3. U. S. Constitution, Article III, Section 2, Clauses 1 and 4:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; * * *."

4. U. S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

5. U. S. Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved:

1. 26 U.S.C. (Internal Revenue Code), Section 6213(a):

"(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is

addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

2. 26 U.S.C. (Internal Revenue Code), Section 6214:

"(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax.—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary or his delegate at or before the hearing or a rehearing."

"(b) Jurisdiction over other years.—The Tax Court

in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year shall consider such facts with relation to the taxes for other years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid.

"(c) Final decisions of tax court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 773."

3. 26 U.S.C. (Internal Revenue Code), Section 6215(a):

"(a) General rule.—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment."

4. 26 U.S.C. (Internal Revenue Code), Section 6871:

(a) Immediate assessment.—Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the filing or (where approval is required by the

Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213(a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

(b) Claim filed despite pendency of Tax Court proceedings.—In the case of a tax imposed by subtitle A or B claims for the deficiency and such interest, additional amounts, and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver. As amended Sept. 2, 1958, Pub.L. 85-866, Title I, § 88, 72 Stat. 1665.

5. 26 U.S.C. (Internal Revenue Code), Section 7421(a):

"Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

6. 26 U.S.C. (Internal Revenue Code), Section 7422:

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

"(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

"(c) Suits against collection officer a bar.—A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected

shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits instituted after June 15, 1942, in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court where the petition to the Tax Court was filed after such date.

"(d) Credit treated as payment.—The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed.

"(e) Stay of proceedings.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in sub-

section (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes)."

7. 26 U.S.C. (Internal Revenue Code), Section 7441:

"The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

8. 26 U.S.C. (Internal Revenue Code), Section 7442:

"The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

9. 26 U.S.C. (Internal Revenue Code), Section 7443:

"(a) Number.—The Tax Court shall be composed of 16 members.

"(b) Appointment.—Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.

"(c) Salary.—Each judge shall receive salary at the rate of $22,500 per annum, to be paid in monthly installments.

"(d) Expenses for travel and subsistence.—Judges of the Tax Court shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the United States Customs Court.

"(e) Term of office.—The terms of office of all judges of the Tax Court shall expire 12 years after the expiration of the terms for which their predecessors were appointed; but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"(f) Removal from office.—Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

"(g) Disbarment of removed judges.—A judge of the Tax Court removed from office in accordance with subsection (f) shall not be permitted at any time to practice before the Tax Court. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879, amended Mar. 2, 1955, c. 9, 69 Stat. 10."

10. 26 U.S.C. (Internal Revenue Code), Section 7444:

"(a) Seal.—The Tax Court shall have a seal which shall be judicially noticed.

"(b) Designation of chief judge.—The Tax Court shall at least biennially designate a judge to act as chief judge.

"(c) Divisions.—The chief judge may from time to time divide the Tax Court into divisions of one or more judges, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the chief judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

"(d) Quorum.—A majority of the judges of the Tax Court or of any division thereof shall constitute a quorum for the transaction of the business of the Tax Court or of the division, respectively. A vacancy in the Tax Court or in any division thereof shall not impair the powers

nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 880."

11. 28 U.S.C. (Judicial Code), Section 1346(a)(1):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;"

APPENDIX B

In The

SUPREME COURT OF FLORIDA

July Term, A.D. 1966

Case No. 34,516

IN RE: DISSOLUTION OF NASH MIAMI MOTORS, INC., a Florida corporation.

Opinion filed September 28, 1966

An Appeal from the Circuit Court for Dade County, Grady L. Crawford, Judge

Daniel L. Ginsberg, for Appellant

Richard M. Roberts, Acting Assistant Attorney General, Meyer Rothwacks, George F. Lynch, William A. Meadows, Jr., and Edward A. Kaufman (Washington, D. C.) for the United States, Appellee

PER CURIAM.

Affirmed.

THORNAL, C.J., THOMAS, ROBERTS, DREW, O'CONNELL, CALDWELL and ERVIN, JJ., concur

APPENDIX C

In The

SUPREME COURT OF FLORIDA

July Term A.D. 1966

WEDNESDAY, OCTOBER 26, A.D. 1966

Case No. 34,516

IN RE: DISSOLUTION OF NASH MIAMI MOTORS, INC., a Florida corporation.

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
Clerk Supreme Court

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT FOR DADE COUNTY)

APPENDIX D

ORDER OF FINAL DISPOSITION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.—IN CHANCERY No. 64C 2 (Judge Crawford)

IN RE: NASH MIAMI MOTORS, INC.

THIS CAUSE coming on this day to be heard on final hearing in the matter of the dissolution of Nash Miami Motors, Inc., and the Court having heard the testimony of the parties and their witnesses and been advised in the premises,

FINDS that in accordance with the decision of the Third District Court of Appeal of Florida, The First National Bank of Miami is to be treated and considered on a similar basis as the other unsecured creditors of the corporation; that the United States Government lien is valid against the property of the taxpayer corporation, Nash Miami Motors, Inc. and takes priority over all other creditors of the corporation except the necessary fees and expenses in connection with the orderly and proper dissolution of the corporation; that the lien of the United States Government, as reflected by Government Exhibits 1 and 2, made a part of the record in the case, greatly exceed the assets of the corporation. It is, therefore,

ORDERED, ADJUDGED AND DECREED:

1. The Trustee is ordered to pay the fees and ex-

penses as heretofore directed in separate order of even date by this Court and to comply with said order pertaining to the retention and protection of the corporate books and records.

2. The Trustee is authorized and directed to thereafter pay over to, transfer, convey and assign to the Treasury Department, Internal Revenue Service, United States of America all remaining assets of each and every kind in possession and control of said Trustee.

DONE AND ORDERED at Miami, Dade County, Florida, this 7th day of June, 1965.

Grady L. Crawford
Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 992

DANIEL L. GINSBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1957 the Commissioner of Internal Revenue served a notice of deficiency in income taxes upon Nash Miami Motors, Inc., which timely filed in the Tax Court a petition to redetermine the asserted deficiency (Pet. 2-3, n. 1).

While the Tax Court proceeding was pending, the petitioner, acting as a stockholder and director, filed in January 1964 in a State court in Florida a complaint seeking the dissolution of the corporation (R.

1-2).[1] On the next day the State court ordered dissolution and appointed a trustee to liquidate the business (R. 3-4).

Pursuant to Section 6871 of the Internal Revenue Code of 1954 (Pet. App. 5-6), which directs the immediate assessment of any deficiency in taxes upon "the appointment of a receiver for any taxpayer in any receivership proceeding before any court of * * * any State," the District Director of Internal Revenue assessed against the corporation the taxes as to which he had asserted a deficiency in 1957 (Pet. 2). A few days thereafter, in the latter part of January, the government filed in the State court proceeding a proof of claim for those taxes (Pet. 2; R. 5).

Ten months later, in November 1964, the Tax Court sustained the deficiency (Pet. 3). The corporation filed a petition to review in the United States Court of Appeals for the Fifth Circuit, which affirmed in April 1966. *Nash Miami Motors, Inc.* v. *Commissioner*, 358 F. 2d 636, certiorari denied, 385 U.S. 918. While the case was pending before the Fifth Circuit, the Florida State Court in June 1965, on the basis of the Tax Court's decision, upheld the government's tax claim (which exceeded the corporation's assets); awarded that claim priority over claims of the other creditors; and directed the trustee, after paying expenses, to turn over the remaining assets to the United States (Pet. 3; Pet. App. 15-16). The Supreme Court of Florida affirmed *per curiam* (Pet. App. 13).

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[1] He alleged (R. 1-2) that its stock was equally divided between two groups which had irreconcilable differences over the conduct of the business; that the corporation had an even number of directors who were similarly divided; and that, unless the corporation were liquidated, the rights of its creditors would be seriously impaired.

The decision of the Supreme Court of Florida was correct, and there is no question warranting further review.

1. Petitioner contends (Pet. 6-11) that by assessing a deficiency and filing a tax claim in the State dissolution proceedings, the United States ousted the Tax Court of jurisdiction to determine the federal tax claim; and that since the Tax Court was thus without jurisdiction, the State court improperly relied upon that court's determination as a basis for sustaining the claim. Although Section 6871(b) (Pet. App. 6) of the Code authorizes the district director to litigate tax claims in State court proceedings, it does not require him to do so. It states only that "claims for the deficiency * * * *may be presented*, for adjudication in accordance with law, to the court before which the * * * receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court" (emphasis added); and it bars the filing in the Tax Court of any petition for redetermination after the appointment of a receiver. Nothing in Section 6871 indicates, or even suggests, however, that once the jurisdiction of the Tax Court has been properly invoked, the subsequent filing of a State court proceeding ousts that court of jurisdiction.[2] See

[2] There is nothing to the contrary in *Abel* v. *Campbell*, 334 F. 2d 339 (C.A. 5) and *Cohen* v. *Gross*, 316 F. 2d 521 (C.A. 3), upon which petitioner relies (Pet. 8-9). Both of those cases involved attempts by taxpayers to enjoin the collection of tax claims that had been allowed in bankruptcy; in neither case had a Tax Court suit been instituted prior to the bankruptcy proceeding. *Abel* held (334 F. 2d at 341-342) that the bar in Section 6871 against filing a Tax Court suit after the taxpayer has been adjudicated a bankrupt is not limited to that part of the tax claim that can be satisfied out of the bankrupt estate, but covers the entire claim that the Bankruptcy

Cunningham v. *Commissioner*, 20 B.T.A. 428; *Harris* v. *Commissioner*, 32 T.C. 1216. To the contrary, the statutory scheme is that where the Tax Court proceeding was filed before the institution of the State court receivership or liquidation action, the district director, although required to make an immediate assessment of the tax, has the option either to continue litigating before the Tax Court or to litigate the tax claim in the State court.

In the present case, in which the Tax Court proceeding had been pending more than six years when the State court action was instituted, the district director reasonably elected to continue the Tax Court litigation. The mere filing of the tax claim in the State court did not constitute an election to litigate the claim there; such filing was merely a protective step, and the State court did not pass upon the claim until its validity had been upheld by the Tax Court.

Since the tax claim was fully litigated before the Tax Court, whose decision was upheld by the court of appeals, there is no basis for any contention that the corporation did not have adequate opportunity to contest the claim. Moreover, the fact that the State court proceedings did not oust the Tax Court of ju-

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Court has allowed. *Cohen* held only that the injunction suit did not come within certain exceptions to the general prohibition upon suits to restrain the collection of taxes. Although those cases contain some general language suggesting that Congress intended the collection procedure in Section 6871 to supplant Tax Court litigation, the language must be read in the light of the circumstance involved, *i.e.*, the bankruptcy proceeding was initiated before any Tax Court suit had been filed. The cases do not suggest that in the present situation, where the bankruptcy proceeding was initiated long after a Tax Court action had been brought, the government's mere filing of a proof of claim in the bankruptcy proceeding ousted the Tax Court of jurisdiction.

risdiction eliminates the ground of petitioner's contention (Pet. 9) that the State court improperly relied upon the Tax Court's determination that the government had a valid claim against the corporation. The doctrines of *res judicata* and collateral estoppel, of course, fully apply to Tax Court decisions. *United States* v. *International Building Co.*, 345 U.S. 502; *Commissioner* v. *Sunnen*, 333 U.S. 591; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; *Bros, Inc.* v. *W. E. Grace Mfg. Co.*, 261 F. 2d 428, 433 (C.A. 5); *Stern* v. *Commissioner*, 215 F. 2d 701 (C.A. 3).

2. Petitioner also challenges (Pet. 11-17) the constitutionality of the Tax Court proceedings, on the ground that the corporation was unfairly discriminated against because, due to its allegedly financial inability to pay the tax and sue in a district court for a refund, it was denied the right, given to more affluent taxpayers, to litigate its case before an Article III court. Similar attacks upon the constitutionality of the Tax Court have recently been rejected by three courts of appeals and this Court has three times refused to review the question[3]—twice in cases brought by this very corporation or its representative.[4] As we set forth in our memoranda in opposition in those two cases,[5] the constitutional claim is without substance, and there is no greater reason to

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[3] *Amos* v. *Commissioner*, 360 F. 2d 358, 359 (C.A. 4); *Nash Miami Motors, Inc.* v. *Commissioner*, 358 F. 2d 636 (C.A. 5), certiorari denied, 385 U.S. 918; *Martin* v. *Commissioner*, 358 F. 2d 63, 64 (C.A. 7), certiorari denied, 385 U.S. 920; *Ginsberg* v. *Fulton*, 382 U.S. 805, denying motion for leave to file petition for a writ of mandamus challenging the constitutionality of the Tax Court.

[4] *Ginsberg* and *Nash Miami Motors, supra*, note 3.

[5] No. 251 Miscellaneous, 1965 Term, and No. 421, this Term.

review it here than there was in any of the other cases that the Court previously declined to review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
JONATHAN S. COHEN,
Attorneys.

FEBRUARY, 1967.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 992

DANIEL L. GINSBERG, individually and on behalf of five sixths of the stockholders of Nash Miami Motors, Inc.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Neal Rutledge
Allan Milledge
Richard L. Horn
Eleanor L. Schockett
Counsel for Petitioners
601 Flagler Federal Bldg.
Miami, Florida 33132

IN THE

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No. 992

DANIEL L. GINSBERG, individually and on behalf of five sixths of the stockholders of Nash Miami Motors, Inc.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of March 13, 1967, denying the petition for writ of certiorari, ——U.S.——, 35 LW 3322, and that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in the above-entitled case as prayed for in the petition filed January 21, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Substantial grounds in support of the issuance of the writ are available to Petitioner and here presented, which were not presented in the petition.

Respondent has conceded in its Memorandum previously filed herein that, under 26 U.S.C. 6871, "the district director . . . has the *option either* to continue litigating before the Tax Court *or* to litigate the claim in the state court." (emphasis supplied) (Res. 4). What respondent has not admitted but what is clear upon the record is that it has done both.

The Government would have the Court believe that they hardly did more than make a clerical application to be heard in the State Court below when they say: "The mere filing of the tax claim in the State Court did not constitute an election to litigate the claim there; such filing was merely a protective step . . . ", (Res. 4). But, in truth, the Government initiated substantial action to its benefit, in the state courts below.

As illustrated by the reported case of *In re dissolution of Nash Miami Motors, Inc., United States v. Nash Miami Motors, Inc.*, 169 So.2d 491 (3rd D.C.A. Fla. 1964), the Government not only actively litigated its claim in the Florida State trial court prior to the rendition of the Tax Court decision (November 25, 1964), but also took an interlocutory appeal from an adverse ruling of the trial court made in February, 1964, and was successful thereby in having reversed the priority of the claim of the First National Bank of Miami in the sum of $9,655.25.

In addition, on remand to the Circuit Court, the Government was successful in defending against a claim for attorney's fees.

Thus while the Government has claimed that it was litigating only in the Tax Court, it was in fact simultaneously prosecuting its claim in the state courts below.

The jurisdictional conflict between the state courts and the Tax Court, which petitioner adverted to in the petition, was therefore clearly present in this case, rather than merely potential as may have appeared from the petition and the Government's memorandum in reply.

In both the Second and Fifth Circuits, which are the only two Courts of Appeal which have considered this jurisdictional conflict, the conclusions as to the effect of presentation and litigation of the tax claim in the receivership Court are the same. The Second Circuit said:

> "We view the provisions of section 6871 not as a mere brief suspension of the requirements of section 6213, but rather as a completely superseding procedure for the determination and collection of tax claims that are asserted in bankruptcy." *Cohen v. Gross*, 316 F.2d 521, 522.

The Fifth Circuit in recognizing *Cohen v. Gross, supra.* and after an examination of the legislative history, said:

> "The legislative history makes clear the intent of Congress that Section 6871 was meant to 'take the case from the jurisdiction of the United States Board of Tax Appeals (now the Tax Court

of the United States) in cases of deficiency.' H. Rep. No. 704, 73rd Cong., 2d Sess. p. 34 (1939) 1939-1 Cum. Bull. 554, 580." 334 F.2d at 341.

The language of the statute, the legislative history, and the decisions of the courts are clear. The Government, having elected the State court forum by its claim and litigation therein, ousted the Tax Court of jurisdiction. The Tax Court decision relied upon by the State court below was therefore a nullity.

It is apparent from the record, that the present case represents not an aberration, but standard practice on the part of the Government in direct violation of the statutory language and intent. The question here presented is one of the utmost practical importance to all Tax Court litigants who go into bankruptcy or receivership proceedings while their cases remain pending in the Tax Court. It is a matter of fundamental importance upon which review, clarification and correction by this Court is appropriate and necessary.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Florida.

Respectfully submitted,

Neal Rutledge

Allan Milledge

Richard L. Horn

Eleanor L. Schockett
Counsel for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Counsel for Petitioners